STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(R. Griffin, J. Neff and H. White)

RONALD G. SWEATT,

Plaintiff-Appellee,

vs.

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.
_____/

Supreme Court No. 120220

Court of Appeals No. 226194

Workers' Compensation Appellate Commission Docket No. 99-0026

AMICUS CURIAE BRIEF OF LIBNER, VanLEUVEN, EVANS, PORTENGA & SLATER, P.C.

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[1] WDCA = Workers Disability Compensation Act, MCL 418.xxx

COUNTERSTATEMENT OF QUESTION PRESENTED

Since Defendant-Appellant's "Statement of Question Involved" is argumentative, Amicus offers the following neutral statement:

WAS THERE "ANY COMPETENT EVIDENCE" TO SUPPORT THE LOWER TRIBUNALS' FINDING THAT PLAINTIFF'S INABILITY TO OBTAIN OR PERFORM WORK WAS NOT BECAUSE OF IMPRISONMENT OR COMMISSION OF A CRIME?

COUNTERSTATEMENT OF FACTS

A. INJURY

Plaintiff Ronald G. Sweatt began working for defendant Department of Corrections in 1986 (15-16[2]).

On December 8, 1989, Plaintiff suffered a knee injury when he was kicked by an inmate (19-20, 12a-13a). Defendant stipulated to work-related injury (4).

B. INCARCERATION

Plaintiff was voluntarily paid compensation until January 12, 1995 (6, 47a), when he was convicted of possession of heroin and incarcerated (25, 18a).[3] Defendant has refused to pay work-loss benefits ever since (4-5).

On March 15, 1995, Plaintiff was transferred to Jackson Correctional Center (26-27, 47), and in May, 1995, while incarcerated, Plaintiff began working at least forty hours per week (29, 21a) at Miller Industries (27, 19a). From February 24, 1996 until his release on parole on June 1, 1996 (25, 18a), Plaintiff was out of the prison on a tether (28, 20a).

Plaintiff continued to work at Miller Industries until July, 1996, when he had a drug overdose and enrolled in a 90-day residential drug abuse rehabilitation program (33,

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[2] Numbers ending in "a" = Defendant-Appellant's Appendix
No prefix or suffix= trial transcript

[3] Actually, the incarceration began two days before in a jail (45, 33a).

23a).

C. SUBSEQUENT WORK

In October, 1996, after the 90-day rehab program ended, Plaintiff attempted to return to work at Miller Industries (33, 23a). However, because he was assigned to heavier work that was beyond his capabilities, he went off work after 2-3 days (32, 33, 37; 22a, 23a, 26a). Plaintiff filed a petition for resumption of workers compensation benefits on November 18, 1996 (3, 8a).

Plaintiff continued to look for work, eventually landing a paper route, which paid far less than he had earned for Defendant (38-39, 27a-28a). In December, 1997, the job was changed to require Plaintiff to climb stairs in an apartment complex (40, 29a). Plaintiff's knee could not handle the stair-climbing, so Plaintiff quit (40, 29a).

In March, 1998, Plaintiff was arrested and spent two days in jail (48-49). He was charged with parole violation, and, though charges were dismissed, spent 30 days in jail beginning June 2, 1998 (40-41, 48; 29a-30a).

On July 7, 1998, Plaintiff obtained a light job at Elco, Inc., where he was working at the time of the November 18, 1998 trial (41, 43, 30a, 32a). Plaintiff still suffers from numbness and occasional pain in the knee, which preclude prolonged standing (23, 16a), stair-climbing and running (24, 17a).

D. REHIRING

Joanne Bridgford (Defendant's disability management coordinator) testified that

the DOC used to have a policy of rehiring no one who was not 100% fit for duty (54-55, 37a-38a)). That policy ended when the Americans with Disabilities Act was passed (55, 38a).[4] Since then, persons with knee injuries could be placed with the Department of Corrections (55, 57; 38a, 40a), though not invariably (59-60 42a-43a).

Meanwhile, on March 25, 1996, a state statute took effect which barred employment of felons by the Department of Corrections,[5] and which Defendant claimed prevented it from rehiring Plaintiff (57, 40a). Bridgman was aware of no efforts to rehire Plaintiff, either before or after that statute took effect (58-59, 41a-42a), and nowhere claimed that Plaintiff would have been offered work, were it not for the statutory prohibition.

E. PROCEEDINGS

Defendant stipulated that Plaintiff remains disabled by a work-related disability (45a). The magistrate refused to disqualify Plaintiff under WDCA 361(1), except during the period Plaintiff was actually imprisoned (50a-51a). She therefore entered an open award of wage loss benefits, beginning June 1, 1996 (Id.).

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[4] The ADA (including its abrogation of sovereign immunity) was passed on July 26, 1990. PL 101-336, 104 Stat 370.

[5] "Beginning on the effective date of this section, an individual who has been convicted of a felony, or who is subject to any pending felony charges, shall not be employed by or appointed to a position in the department." MCL 791.205a(1), added by 1996 PA 140.

On appeal, the Workers Compensation Appellate Commission remanded for a finding as to whether Defendant would have reemployed Plaintiff, but for the prohibition on hiring felons (52a). On remand, the magistrate held that there was "no evidence to support a finding that the State of Michigan would have made an offer of reasonable employment to plaintiff but for the statutory prohibition" (56a).

After remand, the WCAC affirmed in a 4-3 en banc decision. The majority held that, although Plaintiff was no longer employed by the DOC when 1996 PA 140 took effect (62a), the mere inability of an employer to legally employ a worker does not make WDCA 361(1) applicable (63a). Rather, the employer[6] must show that the worker would have offered reasonable employment, but for the illegality (63a). Since there was requisite evidentiary support for the magistrate's finding that Defendant would not have offered work, but for the prohibition, that finding was conclusive on appeal (68a). WDCA 861a(3).

The WCAC also rejected disqualification under WDCA 301(5)(a), no offer of employment having been made as required by that subsection (69a).

The Court of Appeals affirmed in a 1-1-1 decision. Judge Neff agreed that WDCA 301(5)(a) did not apply (80a). She thought it unnecessary to decide whether Defendant would have offered work, but for the felony conviction, since the fact that Plaintiff was

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[6] The WCAC held that the burden of proof is on the employer (68a-69a).

working showed that the commission of a crime did not render him "unable to obtain or perform work" (80a-81a). Judge White would affirm the WCAC, for the reasons stated by the WCAC majority (84a). Judge Griffin, dissenting, would have disqualified based on Plaintiff's legal inability to perform at least one job.

DISCUSSION

I. ANALYSIS OF STATUTORY LANGUAGE

The last sentence of WDCA 361(1) provides,

> However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

A. "FOR SUCH PERIODS OF TIME THAT"

By inclusion of this phrase, the Legislature unambiguously provided that disqualification under WDCA 361(1) is not permanent, but lasts only as along as the situation described by that subsection exists. Since whether the situation exists may change over time, it follows that analysis under WDCA 361(1) requires a chronological analysis, looking at each successive event to determine what effect, if any, it has on disqualification.

B. "UNABLE TO PERFORM OR OBTAIN"

Taken in isolation, "unable" is ambiguous: it could be limited to *physical* limitations, or could include *other* impediments to work, such as lack of qualifications or legal prohibitions.

Other language of WDCA 361(1) resolves the ambiguity. The statute applies, not only to imprisonment, but also to "commission of a crime." While imprisonment frequently physically prevents a worker from working (by separating him from the

employment market), commission of a crime *without* imprisonment never has that effect: if "commission of a crime" prevents a worker from working, it is only because it dissuades employers from employing the worker.[7] Since limiting "unable" to physical inability would render the "commission of a crime" language a nullity, it follows that "unable" encompasses, not merely the worker's physical inability to work, but also nonhiring due to a disinclination of employers to hire criminals (whether from bias, legitimate concerns, or the illegality of employing convicts).

C. "WORK"

"Work" is an ambiguous term, meaning different things in different contexts. Thus, "work" as used in WDCA 301(4) (defining disability) means "some work." *Haske v Transport Leasing Co*, 455 Mich 628, 634, 655 (1997). By contrast, "work" in WDCA 373(1) (the disability standard applicable to retirees) has been defined as "all work." *Peck v GMC*, 164 Mich App 580 (1987), lv den 431 Mich 872 (1988), rec den 433 Mich 879 (1989).

Consistent with *Peck*, Judge Neff would hold that "work" as used in WDCA 361(1) means "all work," so that a worker whose crime prevents him from doing only one of several jobs would not be disqualified. Judge Griffin argued that this view would render WDCA 361(1)'s "commission of a crime" language a nullity, since commission of a crime

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[7] This is also implied by the phrase "or obtain."

without imprisonment never forecloses *all* work (88a).

However, Judge Griffin's "some work" construction has problems of its own. To illustrate, suppose a high school dropout commits a felony. Since a felon may not become a lawyer, the felony precludes "some work," and so would be disqualifying under Judge Griffin's formulation. However, since our worker had neither the education nor training to be a lawyer anyway, disqualification would be both unjust and absurd.[8]

This suggests a middle way. Since it is hard to imagine that the Legislature intended to disqualify when a crime prevents a worker from doing a job that he lacked the education and training to handle anyway, the Legislature presumptively intended the ambiguous word "work" to mean *work within the worker's qualifications and training.*

Committing a felony may also foreclose a boxing profession. But, here again, if our worker lacked the skills and physical ability to box anyway, foreclosure of that job should have no effect on the right to compensation. This latter hypothetical suggests that "work" as used in WDCA 361(1) is limited to *appropriate* work, meaning not only work within the worker's *qualifications and training*, but also work within the worker's *physical and mental capabilities.*

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[8] The Court has been willing to tolerate absurd results to follow the "plain meaning" of a statute. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402 (2000) (WDCA 301(5) applied literally, though it eviscerates the stepped-up wage loss benefits mandated by WDCA 356(1)). However, the meaning of the word "work" in WDCA 361(1) is anything but plain. When construing *ambiguous* language, avoiding an absurd or unjust result is a valid consideration. *General Motors Corp v UCC*, 321 Mich 604, 610 (1948).

Of course, even limiting work to "appropriate" work leaves the question of whether *all,* or only *some*, appropriate work must be foreclosed to make WDCA 361(1) applicable. The answer is provided by rules of construction:

1. In order to serve the Act's purposes (to ensure that costs of work-related injuries are borne by the employer who benefitted from the worker's labor), any ambiguities in the Act should be resolved in favor rather than against coverage. *Deziel v Difco Laboratories*, 403 Mich 1, 33-35 (1978).

2. Since the Act is a substitute for valuable common-law rights to recover in tort,[9] a construction that would leave the worker without any remedy should be eschewed. *Poindexter v Greenhow,* 114 US 270, 303; 29 L Ed 185, 197; 5 S Ct 903 (1884); *Shavers v Attorney General,* 402 Mich 554, 612, n 36 (1977).

3. WDCA 361(1) is a penal provision, and penal provisions should be narrowly construed (much less enlarged by construction). *Gilbert v Kennedy,* 22 Mich 5, 19 (1870).

These constructional rules all support the view that "work" as used in WDCA 361(1) is limited to *all appropriate work.*

The definition we have inferred eliminates, not only the absurdities that would flow from Judge Griffin's definition, but also Judge Griffin's concerns. While it is true, as Judge Griffin says, that "commission of a crime" never eliminates all work *of whatever*

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[9] The Act "substituted compensation for damages." Justice Potter concurring in *Oado v Ford Motor Co*, 273 Mich 510, 516 (1935).

type, commission of a crime may well eliminate all *appropriate* work. For example, take a foundry worker and high-school dropout whose exposure to respirable silica damages his lungs to the point that he can no longer handle work involving any type of exertion. Though *physically* able to handle desk work, he lacks the education to qualify for any desk job. He may be qualified and physically capable of manning a guard shack; but because of a conviction for stealing company property, no one will hire him to a guard shack provision. Since the worker's "commission of a crime" precludes all appropriate work, the worker would be disqualified under WDCA 361(1). In short, by defining "work," not as all work, but as all *appropriate* work,[10] we eliminate Judge Griffin's objection that there would be no case in which commission of a crime would be disqualifying.

It is true that under an "all appropriate work" standard, cases of disqualification because of "commission of a crime" would be uncommon. However, that is as it should be. While the fairness of denying compensation to an *imprisoned* worker is manifest (he's already receiving food and lodging from the public, and so doesn't need compensation), the justification for denying compensation to a worker who, though disabled by a work-related injury, is out of prison and unable to find work because of a criminal conviction is much more dubious. While such unfairness does not justify ignoring statutory

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[10] Although the statute does not use the words "all appropriate work," it doesn't use the words "any work" (Judge Griffin's formulation) either. The statute merely uses the word "work" which, being ambiguous, must be construed by the courts.

disqualification for "commission of a crime," it is a reason to construe ambiguities in the statute against disqualification. At a minimum, the scope of disqualification should not be *extended* by implication (as Judge Griffin would do).

D. "BECAUSE OF"

While WDCA 361(1) plainly requires a causal connection between the unemployment ("unable to perform or obtain work") on the one hand and the crime ("imprisonment or commission of a crime") on the other, the *exact nature* of the causal connection is ambiguous, hence requiring judicial construction.

There are several standards of causation:

1. *"but for" causation.* The most lax causation requirement, it encompasses *multiple* causes and *remote* causes. However, it is not entirely toothless: something must still have "made a difference" to be a "but for" cause. *Matras v Amoco Oil Co,* 424 Mich 675, 589 (1986).

2. *"arising out of" and "substantial factor."* These are the "but for" standard, limited by excluding *trivial* "but for" causes. *Thornton v Allstate Ins Co,* 425 Mich 643, 659-660 (1986); *People v Wells*, 419 Mich 927, 930 (1984).

3. *proximate cause.* This standard requires both that there be "but for" causation, and that the results be reasonably foreseeable. *Nielsen v Stevens, Inc*, 368 Mich 216, 220-221 (1962). Although this standard also embraces multiple causes, it excludes remote causes (i.e., where the chain of "but for" causation is broken by the intervention of an

unforeseeable cause).

4. *"the" proximate cause.* This has been defined as "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit,* 462 Mich 439, 459 (2000). This standard excludes, not merely remote causes, but even foreseeable intervening causes. *Robinson, supra* (though a suspect fleeing the police is highly foreseeable, it still breaks the chain of causation, making the policeman's chase not "the proximate cause" of the suspect's crashing).

While certain words imply certain causal standards, the form of words is often of secondary importance. Thus, "the proximate cause" is sometimes construed as meaning "a proximate cause"[11] and other times as creating a more exacting standard (as in *Robinson, supra*). Indeed, even language as apparently lax as "resulting from" has been held to create an exacting standard equivalent to "the proximate cause." *Robinson, supra,* at 462 Mich 456-457 and fn. 14 (Since "resulting from" is more stringent than even "proximate" cause, suspect's crashing car did not "result from" police pursuit).

In the end, the causal standard created by a statute turns less on the precise language used than it does on the rules of construction brought to bear.

The rules of construction applicable to the statute in question are clear: In order to serve the Act's purposes (to ensure that costs of work-related injuries are borne by the

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[11] *Hagerman v Gencorp Automotive*, 457 Mich 720, 729-734 (1998).

employer who benefits from the worker's labor), any ambiguities in the Act should be resolved in favor of rather than against coverage. *Deziel v Difco, supra.* Moreover, since the Act is a substitute for valuable common-law rights to recover in tort, a construction that would leave the worker without any remedy should be eschewed. *Shavers v Attorney General, supra.* Finally, WDCA 361(1) is a penal provision, and penal provisions should be narrowly construed. *Gilbert v Kennedy, supra.*

These rules of construction all call for the narrowest construction of "because of" that the language will permit. Since "resulting from" was defined in *Robinson v Detroit* as "the one most immediate, efficient, and direct cause," the same definition should be applied to "because of" as used in WDCA 361(1).[12]

E. "IMPRISONMENT"

"Imprisonment" is an ambiguous term: construed literally and narrowly, it means incarceration *in a prison.* Broadly construed, it could mean incarceration in a prison, jail, or any other penal institution. Since all the applicable rules of construction call for a narrow construction of this penal provision, it follows that "imprisonment" is limited to incarceration in a prison.

Nor is this an unreasonable construction: if "imprisonment" were construed to include those in jail, an innocent, disabled worker who is wrongly accused but cannot

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[12] Note that, if even a more lax standard of causation is not satisfied in the case at bar, it would be unnecessary to decide whether a more stringent standard applies.

afford to make bail would be disqualified during the time he is held in jail before acquittal or dismissal of the charges.[13]

F. "COMMISSION OF A CRIME"

WDCA 361(1) provides that "commission of a crime" is disqualifying, but is silent on *how one proves* commission of a crime.

If "commission of a crime" has the same meaning it has in the criminal law, then a worker is presumed innocent until proven guilty *beyond a reasonable doubt*. At a minimum, the workers compensation magistrate would have to become knowledgeable about the elements of the alleged crime. Since, moreover, it would be anomalous to say the worker committed a crime when the criminal justice system would acquit, magistrates would have to apply the rules of evidence and procedure peculiar to criminal cases. The mere fact that it would be impossible for magistrates to become competent in such matters (particularly given the relatively few cases where commission of a crime is raised as a defense) should raise doubt as to whether the Legislature really intended workers compensation magistrates to sit as criminal court judges, deciding de novo whether a crime has been committed.

Conversely, if "commission of a crime" does not carry with it all the baggage that

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[13] This hypothetical is analogous to what actually happened in the case at bar, Plaintiff spending 32 days in jail in 1998 as a result of charges he testified were groundless and which were ultimately dismissed.

criminal law and procedure attaches to the term, we would have a new class of crimes, consisting of acts that the workers compensation system (applying lesser standards of proof and fewer procedural safeguards) considers crimes, but the criminal justice system does not. There are two things wrong with this approach:

1. It amounts to a new definition of a word already having an established meaning,[14] contrary to the rule that, when a statute uses a term of art, the meaning of the term of art is presumed to be intended. MCL 8.3a.

2. It would create anomalous situations, such as a worker who has been *acquitted* by the criminal justice system nevertheless being found guilty of a crime by a workers compensation magistrate. The criminal proceedings would not be *res judicata* if the standards of liability differ. Indeed, if the magistrate is not bound by what the criminal justice system does, a worker *convicted* of a crime *would be entitled to a trial de novo* before the magistrate on the issue.

It is hard to believe that the Legislature intended either of the foregoing scenarios: entitling the worker the full panoply of rights enjoyed in criminal cases, or creating a new species of criminal cases, with magistrates not bound by what goes on with the worker's criminal case. What, then, did the Legislature intend? The only conclusion that avoids the absurdities of both the foregoing scenarios is to construe "commission of a crime" as

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[14] The criminal code already defines "crime." See MCL 750.5

meaning a crime *as determined by the criminal justice system.* Since there is no commission of a crime in that sense unless and until a conviction has been entered, it follows that only a worker convicted of a crime can be disqualified by WDCA 361(1). *Weathersby v Grand Rapids,* 1992 WCACO 111 (No. 35, Jan. 24).

II. APPLICATION OF LAW TO FACTS

A. INTRODUCTION

As noted, since disqualification may begin, end, and begin again depending on whether commission of a crime is causing unemployment, it is necessary to review the facts of the case chronologically and evaluate the effect of each change in circumstances.

Plaintiff was convicted of a crime on January 12, 1995. Since the resultant incarceration rendered Plaintiff unable to do all appropriate work, disqualification under WDCA 361(1) began.

B. PASSAGE OF 1996 PA 140

1996 PA 140 (which prohibits hiring of felons by the Department of Corrections) took effect on March 25, 1996. The effect of that event on Plaintiff's entitlement to workers compensation benefits can be summed up in one word: zero. There are several reasons this is so.

1. Although one could debate which standard of causation "because of" incorporates (see I.D., *supra*), it is clear that it requires at least "but for" causation. The magistrate and Appellate Commission found that not even that lax standard was satisfied.

Specifically, Defendant lifted its policy of not calling back disabled workers as early as 1990 (when the ADA was passed), yet did not call plaintiff back to work. Plaintiff had been out of work for some five years thereafter but before 1996 PA 140 went into effect, without Defendant offering any of the favored jobs it later claimed it had. In view of the contrary evidence of Defendant's actual behavior, the magistrate was not bound to believe the self-serving, after-the-fact testimony by Bridgford that favored work was available for people disabled as Plaintiff is. Since, moreover, Bridgford never claimed that Defendant would have called Plaintiff back, but for 1996 PA 140, Defendant failed to prove that the statutory prohibition on employing felons was even a "but for" cause of Plaintiff's not returning to work at MDOC.[15] Since causation is a question of fact, and since there was evidence to support the lower tribunals' finding of no causal relationship between 1996 PA 140 and Plaintiff's unemployment, that finding is binding on the courts. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691 (2000).

2. Even if we pretended that 1996 PA 140 was a "but for" cause of Plaintiff's inability to work for MDOC, a proper construction of WDCA 361(1) (construing the Act liberally to provide compensation, and construing penal provisions narrowly) requires

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Contrary to Defendant's argument, this does not impose an impossible burden, nor require defendant to prove an actual offer of work: credible testimony that Defendant was trying to, or even merely intended to, return Plaintiff to work until 1996 PA 140 intervened could satisfy it. Defendant offered no such evidence, and what evidence there was (of no return-to-work offer for five years before 1996 PA 140 was passed) creates an inference that Defendant had no intention of offering Plaintiff favored work.

more than "but for" causation: the criminal conviction must be "the one most immediate, efficient, and direct cause" of the worker's inability to obtain or perform work (See I.D., *supra*). Since, per contra, 1996 PA 140 was not even a concurring cause of Plaintiff's unemployment, WDCA 361(1) does not disqualify.

3. Apart from that, since 1996 PA 140 applies only to corrections workers, it forecloses only one job. Since the conviction that prevents Plaintiff from working for MDOC does not foreclose *all* appropriate work, it did not cause inability to obtain or perform "work" as that word is used in WDCA 361(1) (See I. C., *supra*).

4. Last but not least, the hiring prohibition of 1996 PA 140 applies only to new hires, not to persons previously employed by the Corrections Department:

> This section does not apply to a person employed by or appointed to a position in the department before the effective date of this section. MCL 791.205a(3).

Defendant argues that the quoted exclusion applies only to persons employed by the DOC on the date 1996 PA 140 took effect. However, if that was the Legislature's intent, why didn't it say "*as of* the effective date" rather than "*before* the effective date"?

A plain English reading of the exclusion is that it covers people who, like Plaintiff, were employed by MDOC before March 25, 1996. Even if the exclusion were considered ambiguous, rules of construction (construing penal provisions narrowly) mandate a construction of MCL 791.205a that would not prohibit rehiring of Plaintiff by the MDOC. Since it was not in fact illegal to rehire Plaintiff, that pulls the rug from under

Defendant's argument that Plaintiff's conviction prevented his rehiring by the MDOC.[16]

C. RETURN TO WORK

The next significant event is Plaintiff's beginning work at Miller Industries in May, 1995. Since Plaintiff was actually working, at this point Plaintiff's conviction or imprisonment was no longer causing inability to perform all appropriate work, so WDCA 361(1) disqualification ended.[17]

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Judge Griffin argued that it is unfair to require the employer to pay compensation when the law prevents the employer from offering favored work (90a). However, if the Legislature intended disqualification under 361(1) to turn on the employer's ability to offer favored work, why didn't it incorporate provisions to that effect (as it did in WDCA 301(5)(a))? Even under the latter subsection, employers prevented from offering favored work by things beyond their control (such as lack of available work within the worker's restrictions, or inability of the worker to handle the proffered work for even non-injury-related reasons) are not on that account excused from paying compensation.

Moreover, if unfairness justifies rewriting the statutory language, we would have to factor in the unfairness of an employer benefitting from the worker's labor, providing an unsafe workplace that causes an injury, and then seeking to deny compensation to the worker who is carrying two occupational millstones around his neck: being disabled, and having a criminal record.

Since one's personal view of what is fair cannot justify departure from the language of a statute, the employer's ability to offer favored work is a legally irrelevant consideration under WDCA 361(1). Using that consideration to disqualify in situations where the statutory language does not clearly mandate disqualification would be judicial legislation.

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Both Plaintiff's concession that he was entitled to no compensation during the time of his incarceration, and the statutory one-year back rule preclude recovery of wage-loss benefits during this time, thus rendering compensability during this time moot. While the mootness would justify not addressing the issue at all, if the Court does address it, it should not allow Plaintiff's concession to prejudice other workers who may seek benefits during the time they are on work-release.

On June 1, 1996, Plaintiff was released on parole. Since he was already working at the time, the only effect of this event was to eliminate an even arguable case of disqualification because of imprisonment.

D. FIRST LOSS OF MILLER JOB

On July, 1996, Plaintiff went off work because of a drug overdose and enrollment in a drug rehabilitation program. Since no conviction resulted from the drug use, there was no "commission of a crime" as that term is used in WDCA 361(1), hence no disqualification (See I.F., *supra*). Even if it were proper for the magistrate to decide de novo whether a crime was committed, insufficient evidence was presented at trial to prove that the drug use was a crime.[18] Moreover, Plaintiff testified that his enrollment in the rehab program was not a penalty for the drug use; and if the enrollment in the program was not caused by any crime, perforce inability to work because Plaintiff was enrolled in the program was not caused by any crime either.

Since Plaintiff was not disqualified by WDCA 361(1), his right to compensation on losing the Miller Industries job is governed by WDCA 301(5). Since undergoing treatment for a non-work-related condition is "good and reasonable cause" to quit work (*Zuverink v Herman Miller*, 2000 WCACO ____, 14 MIWCLR 1025 (No. 424, Aug. 9)) Plaintiff's quit was not disqualifying under WDCA 301(5)(a). Even if we pretended it

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[18] The drug used, the applicable statute, the elements of the crime, etc. were never shown.

were, any disqualification would have ended in October, 1996, when Plaintiff returned to work at Miller Industries. *McJunkin v Cellasto Plastic Corp,* 461 Mich 590 (2000) (disqualification ends when refusal to work is withdrawn).

E. SECOND LOSS OF MILLER JOB

Plaintiff left the Miller Industries job after a few days in October, 1996 because it was beyond his physical capabilities. Since the loss of the job had nothing to do with any crime, 361(1) disqualification does not apply. Moreover, since work beyond a worker's capabilities is not "reasonable employment" (WDCA 301(9)), and since only quits from "reasonable employment" are disqualifying under WDCA 301(5)(a), Plaintiff's leaving Miller Industries is not disqualifying under the latter subsection either.

F. PAPER ROUTE

Plaintiff's obtaining a paper route job had no effect on disqualification, except to buttress the fact that Plaintiff's previous drug conviction still was not preventing plaintiff from obtaining or performing all appropriate work. Moreover, since loss of the paper route (like loss of the Miller Industries job) was due to physical incapacity, there was no disqualification under 361(1) or 301(5).

G. 1998 INCARCERATION

Plaintiff was jailed for two days in March, 1998, and for thirty days in June, 1998. As noted, rules of construction call for defining "imprisonment" as being confined *in a prison* (See I.E., *supra*). Since there was no evidence of that here (evidently, the time was

spent in jail), there was no 361(1) disqualification during this time.

Although being in jail obviously affected Plaintiff's ability to work, the rule apart from statutory disqualification is that a disabled worker's right to wage-loss benefits is unaffected by *concurrence* of non-injury-related reasons for the disability. *LeTourneau v Davidson,* 218 Mich 334 (1922); *Powell v Caso Nelmor Corp,* 406 Mich 332, 352 (1979).

H. 1998 RETURN TO WORK

In July, 1998 and through the trial date, Plaintiff was employed at lighter work. Since Plaintiff was not disqualified at the time he started work at Elco, the only effect of his obtaining that job was to buttress the conclusion that he was not unable to obtain or perform work because of a crime.

III. CONCLUSION

Workers Compensation is supposed to be a no-fault system, with compensation payable, not because the employer is bad or the worker is good, but because injured workers need to be taken care of, and it makes more economic sense to cast that burden on the employer who benefitted from the worker's labor. Since disqualifying misconduct rules contradict these basic principles, they should be narrowly construed. Doing that in the case at bar, since Plaintiff's conviction of a crime did not directly or exclusively cause complete inability to work (except when Plaintiff was imprisoned from January 12 to May, 1995), the lower tribunals correctly found that Plaintiff is not disqualified from receiving compensation at other times.

Respectfully submitted,

LIBNER, VanLEUVEN, EVANS,
PORTENGA & SLATER, P.C.

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By _____
John A. Braden
As Amicus Curiae